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421-630—71

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1334

MILTON SILVERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–40a) is reported at 430 F. 2d 106. The amending opinion on rehearing (Pet. 42a–43a) is not reported. The opinion of the district court (Pet. 44a–64a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1970 (Pet. 41a). A petition for rehearing was denied (except for a minor deletion from the original opinion) on December 11, 1970 (Pet. 42a–43a). Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to February 9, 1971, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an attorney previously retained to examine union records could, consistently with the attorney-client privilege, be questioned at trial about the contents of those records at the time of his examination.

2. Whether counts of an indictment charging embezzlement and conversion of funds from named unions failed to charge offenses because they did not allege in express terms that each union was a labor organization in an industry affecting commerce.

3. Whether the evidence was sufficient to sustain the convictions.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on sixteen counts (counts one through fifteen and count eighteen) of an eighteen-count indictment charging embezzlement from, and falsification of records and reports of, certain unions. Counts 1 through 13 charged embezzlement and conversion of monies of two local unions in violation of 29 U.S.C. 501(c); count 14 charged embezzlement of money of an employee welfare benefit plan of another local union in violation of 18 U.S.C. 664; count 15 charged violation of 29 U.S.C. 439(b) in the false reporting on a Labor-Management Report of the money referred to in count 1; and count 18 charged that petitioner caused false entries to be made in the books and records of the two local unions

in violation of 29 U.S.C. 439(c).[1] Petitioner was sentenced to concurrent four-month prison terms on counts one through fifteen, and to a consecutive four-month term on count eighteen; he was also fined $1,000 on each count. The court of appeals unanimously affirmed the conviction as to counts nine through fifteen and count eighteen. With one judge dissenting, it reversed the convictions on counts one through eight (Pet. 1a–36a; 37a–40a).[2]

1. The evidence (the sufficiency of which is challenged only as to counts 10–13) is set forth in some detail in the opinion of the court below (Pet. 2a–3a, 18a–22a, 24a–27a) and, to a lesser degree, in the opinion of the district court denying petitioner's motion for arrest of judgment (Pet. 47a–51a). In 1965 and 1966, petitioner was the principal officer of affiliated labor organizations: he was the president of Teamsters Local 810, business manager of Electrical Workers Local 1614 and the administrator and trustee of an affiliated union's welfare and pension funds. The government's case showed that petitioner embezzled various sums from the organizations under his control and falsified union records and reports made to the Department of Labor in order to conceal the embezzlements. In brief, the evidence on the various counts upon which the convictions were affirmed, was as follows:

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[1] The statutory provisions on which these counts were based are set out at Pet. 65a–68a.

[2] The Court's opinion (except as to the reversed counts upon which he dissented) was written by Judge Moore. An opinion by Judge Friendly, joined by Judge Hays, represents the decision of the panel on the reversed counts.

Count 9. In July 1966, petitioner used a blank union check to defray personal expenses of $1,200 at a union convention. All the delegates (including petitioner) were entitled only to $800 in expenses. The amount expended by petitioner was without union authorization (Pet. 50a).

Counts 10 through 13. In December 1965 and again in December 1966, Local 810 and Local 1614 each issued $2,000 checks to petitioner that were carried on the books as steward's committee expenses (Pet. 18a). There was no authorization for the 1966 payments (Tr. 261–262, 283, 301) and two members of the executive board of the locals had no recollection of any resolution authorizing the 1965 payments (Tr. 260–262, 283, 296–299, 301). The minutes of the December 3, 1965, executive board meeting which purported to authorize the 1965 payments were typed on a typewriter not used in the preparation of the other pages of the minutes of that meeting or of any other papers of the minute books (Tr. 580–587, 600). Jacob Friedland, an attorney, retained to examine the records of Local 810 before they were produced before the grand jury in 1967, but after the subpoena had been issued for their production, testified that the December 3, 1965, minutes had been changed to show authorization of a loan of $2,000 to petitioner between the time Friedland saw them in 1967 and the time they were exhibited to him at trial (Tr. 978–983).

Count 14. During the renovation of a building in the summer of 1966, a large air-conditioning unit belonging to the welfare fund of which petitioner was a trustee was sold to a scrap dealer for $1,000. The cash

proceeds were pocketed by petitioner after being placed on his desk and were never turned over to the welfare fund (Tr. 399–401, 537–538; Pet. 21a–22a, 50a–51a).

Count 15. The required 1965 annual report of Local 810 filed with the Secretary of Labor [3] included a payment of $2,581.37 to Scoop Printing Company, which was referred to in the report as "Office and Administrative Expenses." The money had in fact been used for the benefit of a slate of local political candidates (Tr. 347–354) and was paid by a check signed by petitioner, purportedly for stationery items ordered by the union (Tr. 115–117; Pet. 9a). Petitioner approved the payment with full knowledge of its use in the political campaign (Tr. 833–834). Petitioner also signed the report as the local's president after discussing it with the accountant who prepared it (Tr. 249–254).

Count 18. The required books and records of the two local unions showed false entries as to the bills from the Scoop Printing Company and the Behl Printing Company, and falsely carried the payments referred to in counts 10–13 as committee expenses (Pet. 9a–10a, 25a, and notes 11 and 12). The records also included the altered minute books (Pet. 25a).

2. In February 1967, after Local 810 received a grand jury subpoena *duces tecum* for the production of its records (including its minutes), Jacob Friedland, the attorney previously referred to, was retained

[3] This report was required by the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 431(b) (see Pet. 67a).

to review these records, including the minutes of the Executive Committee for December 3, 1965. He prepared a report of his examination of these records and was paid for this service by the union, to which he had submitted a bill (Tr. 468–469).[4] At trial, in March 1969, Friedland was called as a government witness. He testified that he had no independent recollection whether the December 3, 1965, minutes contained a paragraph showing that the committee authorized a $2,000 loan to petitioner and $2,000 as additional compensation to petitioner for money for use as Christmas gratuities (Tr. 468–469; Pet. 25a–26a). The government requested that he be allowed to look at his report (then in possession of an attorney for Local 810) for the purpose of refreshing his recollection about this particular paragraph in the minutes. The defense objected, claiming the attorney-client privilege (Tr. 475–476, 485, 611, 630). The trial court declined to rule on the motion until further evidence was adduced (Pet. 26a).

After evidence was introduced suggesting that the minutes had been fabricated in the manner charged, the trial court denied the claim of attorney-client privilege "because it was being pressed improperly on the basis of books which are properly producible and which have no cloak of secrecy surrounding them and on the further grounds that the purpose of pressing the claim of privilege is an unlawful purpose because

[4] Friedland testified he was retained by both the union and petitioner. The district court made no findings as to whether petitioner as well as the union was the client of the attorney (Tr. 609–611).

the client who is pressing the claim is pressing it in order to frustrate an attempt to establish a very relevant fact in this case, namely whether these minute books were authentic books at the time they were produced for the government or whether they were partially fabricated" (Tr. 612–621).[5] At this point, Mr. Friedland claimed the privilege against self-incrimination (Tr. 637–638) and the government rested its case (Tr. 658).

Thereafter, Mr. Friedland was granted immunity from prosecution and testified as a government witness on rebuttal. After examining his report, he said that his "memory has been refreshed with respect to these minutes and basing it entirely on the report, it indicates a change in the minutes" (Tr. 979). When asked to refresh his recollection as to the change, he stated that his report stated that "[t]here is a loan to Milton Silverman in December 1965 and there is no approval of this loan by the Executive Board" (Tr. 980; Pet. 27a). After Mr. Friedland left the stand, the court placed this sentence of the report into evidence as a court exhibit (Tr. 1000–1003). When defense counsel further objected to leaving out the next sentence, the court also placed it in evidence (Tr. 1003).[6] These were the only portions of the report introduced.

[5] Before making this ruling, the trial judge (Judge Palmieri) consulted with Judge Murphy who had granted a pretrial motion to quash a subpoena for this report in its entirety (Tr. 628; Pet. 25a).

[6] This sentence reads (Tr. 1003): "There is a payment of $2,000 to Mr. Silverman in December 1965, for Christmas gifts and this requires an accounting of where the money was spent."

ARGUMENT

1. Petitoner broadly contends that Mr. Friedland's testimony concerning his report and other references to the report constituted a violation of the attorney-client privilege (Pet. 11–16). The court below analyzed this claim with utmost care and properly rejected it (Pet. 25a–29a).

It is settled that the attorney-client privilege "protects only those papers prepared by the client for the purposes of confidential communication to the attorney or by the attorney to record confidential communication * * *" *Colton* v. *United States,* 306 F. 2d 633, 639 (C.A. 2), certiorari denied, 371 U.S. 951. The minutes of Local 810 were not confidential. This is clear both under established legal principles regarding union records, *e.g., Curcio* v. *United States,* 354 U.S. 118, 122, and under the Labor-Management Reporting Act of 1959.[7] When that record was given to the attorney for examination as a prelude to delivery to the grand jury, its character as a union record did not change and the only portion of counsel's report relating thereto which was revealed at trial was "a description of the minutes as they appeared when presented" to him (Pet. 28a). Accordingly, there was here no disclosure of any confidential communication from the report nor any disclosure of any advice from Mr. Friedland to a client. The report was used merely to refresh Mr. Friedland's recollection of the contents of the nonconfidential minutes at the time when he had access to them. To urge, in these particular circumstances, that the use of the report violated

[7] See 29 U.S.C. 431(a)(5), (*c*), 436.

the privilege is to propose the anomalous doctrine that documents which are not privileged when in the hands of the client somehow became clothed with immunity when turned over to an attorney. This seeks to press the privilege well beyond its recognized purpose of fostering the attorney-client relationship.[8]

2. Counts 9 through 13 charged that petitioner embezzled and converted to his own use certain "assets of a labor organization of which he was an officer and by which he was employed, to wit, Local 810, International Brotherhood of Teamsters, and Local 1614, International Brotherhood of Electrical Workers," in violation of 29 U.S.C. 501(c) (Pet. 4a). This statute makes it a crime, *inter alia,* for a person to embezzle or convert to his own use money "or other assets of a labor organization of which he is an officer." A labor organization is defined by 29 U.S.C. 402 as one "engaged in an industry affecting commerce"; that section provides also that a labor organization shall be deemed to be engaged in an industry affecting commerce if it is the certified representative of employees under the

[8] To support his assertion (Pet. 16) that the court below "departed from accepted judicial principles" with respect to the privilege in this case, petitioner seeks to rely upon the fact that the court "took the unusual step of deleting a major portion of the opinion dealing with this issue." The portion deleted was essentially a short discussion of Wigmore's views that only confidential communications between attorney and client are privileged (Pet. 28a–29a); it was removed only for the purpose of avoiding any impression that the court meant to engraft an exception to the attorney-client confidential communication rules (Pet. 42a–43a). If anything, therefore, the deleted material underscored the court's conclusion that attorney Friedland's report did not fall into a protected category.

provisions of the National Labor Relations Act (see Pet. 3a–4a n. 1).

The claim that these counts, and related counts 14 and 15, were defective in not alleging in express terms that the labor organizations were engaged in an industry affecting commerce was properly rejected by the court below (Pet. 3a–9a), as it had earlier been by the district court in an extended opinion (Pet. 44a–64a). By using the term "labor organization" (as does the statute) and by particularizing two particular labor organizations, the indictment charged by necessary implication that the unions were labor organizations within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 and as such engaged in an industry affecting commerce under 29 U.S.C. 402. The indictment met the essential requirements of informing petitioner of the nature of the charge against him and prevents his being twice placed in jeopardy. See, *e.g.*, *Russell* v. *United States*, 369 U.S. 749, 763–766. The argument that there may not have been evidence before the grand jury of interstate commerce (Pet. 18–19) is fully answered by the opinion below, upon which we rely in this respect (Pet. 3a–9a).[9]

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[9] Petitioner is in error in contending (Pet. 18–21) that the decision below conflicts with *Walker* v. *United States*, 342 F. 2d 22 (C.A. 5), certiorari denied, 382 U.S. 859, or *United States* v. *Carll*, 105 U.S. 611, both forgery cases. In *Walker*, the court found that the more reasonable construction of the allegation that appellant acted "with intent to defraud" was that the fraud was directed toward the business at which the checks were cashed rather than against the United States. In *Carll*, this Court found the indictment deficient because it omitted allegations of knowledge that the obligation was forged.

3. The challenge to the sufficiency of the evidence on counts 10–13 (involving the four $2,000 checks received by petitioner in 1965 and 1966) is that, although the evidence shows petitioner received money that belonged to the union, and did not file vouchers to show how it was spent, it fails to show that he spent it for nonunion purposes. The jury could have found, however, that there was no required authorizing resolution for these "Christmas gratuities." (See Statement, *supra* pp. 4–7.) In an embezzlement case, the government meets its burden of proof where, as here, it shows a wrongful receipt of money belonging to another. It does not have the burden of showing what the defendant did with the money after he took it. See *Doyle* v. *United States,* 318 F. 2d 419 (C.A. 8). The defendant may, of course, come forward with an affirmative defense; leaving it to him to do so is not to require him to prove his innocence, and the government does not have the burden of negating all such possible defenses.

Nor did the court below rely upon an improper standard in reviewing the conviction. Under *Glasser* v. *United States,* 315 U.S. 60, it was required to examine the evidence in the light most favorable to the prosecution. The decision in *In re Winship,* 397 U.S. 358, does not require a reviewing court to apply a "reasonable doubt" standard, it holds only that the trier of fact, not the reviewing court, must find guilt beyond a reasonable doubt in a criminal case.[10]

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[10] The decision in *United States* v. *Lynch,* 366 F. 2d 829 (C.A. 3), upon which petitioner relies (Pet. 26–27), turns, as the court below found (Pet. 19a), on its particular facts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971